The place itself was not dangerous and the culprit had made various attempts to return the child to the latter's home as shown by the court decision. Under such circumstances, it could be said that the child was released at a "safe place" as designated by the Criminal Code, Article 228, Paragraph 2.

[Comment]

This was the first decision ever made by the Supreme Court on the provision for a reduction of penalty by reason of "release" as stated in the Criminal Code, Article 228, Paragraph 2. Moreover, it is worthy of note that the decision laid down a course aimed at interpreting the article in question in a forward-looking manner. The decision also made a relatively wider interpretation of "safe place" in consideration of the characterization and purpose of the said article.

The characterization of the article, however, still remains problematical whether or not it should be based on a reduction of responsibility as in the case of the voluntary desistance from a crime or on simple criminal policy consideration. At any rate, the current decision seems to have given consideration to the safe rescue of the kidnaped in order to avoid tragic results in the crimes of kidnaping for ransom. Accordingly, it appears that importance has been attached to the fact that the child was released instead of making a strict evaluation of all the prevailing circumstances.

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b. Law of Criminal Procedure

1. The case in which a request for dismissal and reappointment of state-appointed defense counsel was turned down.

Decision by Third Petty Bench, the Supreme Court, July 24, 1979. (Case No. (*a*) 798 of 1976. Charges against assembly

with dangerous weapons, obstruction of work by treat, and obstruction of performance of official duties. 33 *Keishū* 416.)

[Reference: Constitution § 37 (7), and Code of Criminal Procedure § 36]

[Opinions of the Court]

In the course of the hearing of the first instance, the accused refused to comply with the request of the state-appointed defense counsel for necessary information for their defense, and not only verbally abused but assaulted the defense counsel during the preliminary meeting.

1) Judging from the afore-mentioned fact, it must be appraised that the accused had displayed by their own behavior that they had no intention to engage in a defense through a state-appointed defense counsel. Under such circumstances, the court was obliged to dismiss the state-appointed defense counsel at the latter's request.

2) Moreover, under the circumstances in which the defendants were found maintaining and continuing such a situation together, the court is not obligated to respond to their request for appointing another defense counsel.

[Comment]

In recent years there have been many cases causing confusion at court over the right of defense enjoyed by defendants. Particularly, in the trials involving so-called "radical elements," such circumstances have often occurred due to their exercise of the right of defense as part of their "court struggle." The current case was one example in which the right to claim the selection of a state-appointed defense counsel was abused.

Incidentally, there was a reverse case in which the Tokyo High Court acknowledged the decision of the lower court which turned down the arbitrary request of the accused for dismissing the state-appointed defense counsel. (Decision by the Tokyo High Court, Nov. 24, 1979. 11 *Keisai Geppō* 1.) Both cases were

worthy of notice in that restrictions on the right to request a state-appointed defense counsel was abused.

2. Voluntary accompaniment with the police and arrest.

Decision by the 10th Criminal Division, Tokyo High Court, Aug. 14, 1979. (Case No. (*u*) 49 of 1979. Charge of habitual burglary. 402 *Hanrei Taimuzu* 149.)

[Reference: Code of Criminal Procedure § § 198 (1) and 199; Constitution § 33]

[Issues]

Although the act calling on the suspect to accompany the police voluntarily could be considered tantamount to virtual arrest, thus constituting illegality, the illegality of the said arrest could not be considered so grave as to term the detention made later also illegal. Hence, the permissibility of confession made during the detention was acknowledged in the current case.

[Opinions of the Court]

The accused broke through a car check relating to a burglary and escaped. The police spotted him in the neighborhood of a Japanese National Railways station the same day. The suspect was first taken to a waiting room of the station and then to a police box. Finally, he was asked to accompany the police to a police station. It was around 11 p.m. and he was taken into an unmarked patrol car and sandwiched between two policemen.

1) "Judging from the development of the case, the act in which the suspect was accompanied from a police box to the police station in an unmarked patrol car should be considered illegal, being tentamount to arrest in substance on the ground that the compelling force similar to that of arrest was inflicted on the suspect considering the place, behavior, time and circumstances after being called upon to accompany the police."

2) However, judging from the fact that the accused had forced his way through a car check driving a car used by a criminal, "it

is proper to acknowledge that both necessity and reason existed to conduct an emergency arrest at the time of the virtual arrest described above."

"On the other hand, the request for commitment to the prosecution and detention made later was lawful. Accordingly, the degree of illegality of the virtual arrest in question cannot be considered grave enough to make the detention made later an act of illegality." In this sense, it is unwarranted to term the confession made during detention as an illegal act aimed at collecting evidence.

[Comment]

It is not uncommon to request the suspect to accompany the police with his consent for interrogation prior to arrest. There are cases in which the police physically forced the suspect to appear. In the current case, the court admitted that voluntary accompaniment could be considered an arrest at times and listed the requirements for such. There was a similar case in Toyama (decision by the Toyama District Court, July 26, 1979. 946 *Hanrei Jihō* 137).

3. The procedure of compulsorily drawing off urine from the suspect against the latter's will, and the permissibility of an expert's written statement based on the material obtained by such a procedure.

Decision by the Second Criminal Division, Nagoya High Court, Feb. 14, 1979. (Case No. (*u*) 192 of 1978. Charge of violation of the Stimulant Drugs Control Act. 383 *Hanrei Taimuzu* 156.)

[Reference: Constitution § 35; Code of Criminal Procedure § § 139, 168 and 317]

[Opinions of the Court]

"The action in the current case in which a number of policemen forcibly held down a suspect, who refused to pass urine for a test and put up strong resistance, and drew off his urine from the penis by a catheter should be deemed illegal, even if

it was based on a warrant issued by a judge and the urine was actually collected by a doctor, since the action considerably damaged the dignity of the suspect and went beyond the limit permissible as a reasonable process to execute the warrant.

"However, the illegality in the case cannot be considered so grave as to disregard the spirit of the warrant system in the Constitution and the Code of Criminal Procedure, in the light that there were strong suspicions immediately after the suspect was arrested that he had been using a stimulant drug. In this connection, the written statement of an expert's opinion on an examination of the urine which was offered as reference material has the value of evidence."

[Comment]

The current case recognized that there is a limit concerning the steps and methods used in examinations. With regard to the value of evidence, the Supreme Court in its decision on Sept. 7, 1978 (32 *Keishū* 1672) ruled that even if the procedure of collecting evidence was unlawful, the value of evidence could be affirmed depending upon the degree of unlawfulness. The decision in the current case was based on the precedent set by the Supreme Court.

4. The period of limitation for prosecution in a case where a single act of negligence caused a number of results leading to death or injury over a lapse of time.

Decision at the Kumamoto District Court, the Second Criminal Division, Mar. 22, 1979. Charges against crimes of inflicting injury or causing death by negligence in the performance of work, Case No. (*wa*) 164 of 1976. 931 *Hanrei Jihō* 6.

[Reference: Code of Criminal Procedure § § 250, 253 ; Criminal Code § 54]

[Opinions of the Court]

With regard to the seven victims in the current case, there was a time lag between the deaths of five and the remaining two. Ordinarily when a single act causes several results, the limitation

period for prosecution "should be 'as a matter of principle' observed as one without arguing the limitations separately."

"However, when a single act is subjected to Crime A, Crime B and Crime C in that order, Crime A and Crime B which occurred during the limitation period of Crime A should be handled as one. In case the result subject to Crime C does not occur before the expiration of the limitation period of the above crimes, the limitation period for Crimes A and B shall be expired, and even if the result of Crime C occurs later the right to prosecute concerning Crimes A and B shall be absolutely quashed."

In this regard, the deaths of the five which had occurred earlier and the limitation period which had already expired shall be dismissed from the current case.

[Comment]

This was the judgment on the limitation period of prosecution in the decision of the Kumamoto Minamata disease case introduced here earlier. In cases involving public hazards, a single act often claims many lives and exposes many persons to danger, and if the limitation period had run each time a result occurred, legal stability would be greatly hampered. As such, the judgment by the court on that score indicates that the court really worked hard on it. Since the question raised here has not been discussed much in the past, the current judgment is worthy of note.

5. An order for discovery of evidence concerning an abstract of the Clutter Diary in connection with the Lockheed case.

Decision by the 25th Criminal Division of the Tokyo District Court, Apr. 5, 1979. (A charge of violation of the testimony in the Diet Act, Case No. (*toku wa*) 80 of 1977. 11 *Keisai Geppō* 383)

[Reference: Code of Criminal Procedure § 299]

[Opinions of the Court]

1) In a case where it is possible to test the credibility of the testimony of a witness with the discovery of an abstract of a diary compiled by him even after the examination of the witness

is completed, and if the discovery of the abstract, with the elimination of the parts relating to the interest of a third country, is not detrimental to the interest of the said third country, the defense counsel should be given an opportunity to peruse "the parts of the document shown to witnesses appertaining to the examination and quoted in the course of the examination and testimony."

2) With regard to the parts other than those mentioned above, "the demand for discovery can be interpreted as a positive attempt to make use of it as counter evidence." Generally speaking, an act such as "to peep into the evidence in the hands of the other party" cannot be permitted.

In the current case, however, the possessor of the diary is most likely to refuse its presentation, and an attempt to take such a step runs counter to the economy of lawsuits. Moreover, the abstract of the diary in question was the result of the interrogation of the witness conducted by a court in the United States, which does not carry as much weight as the work product of the prosecution.

In such a case, the discovery of "parts extremely important for the defense of the accused" should be acknowledged.

[Comment]

This is a case concerning the discovery of the abstract of a diary a witness used during examination under requisition in the Lockheed case. The purpose of the discovery is divided into testing the credibility of the witness and searching for counter evidence. It must be noted that considerably strict conditions are imposed in the case of the latter. The decision made by the Supreme Court on Apr. 25, 1969 (*23 Keishū* 248) is a precedent that the court can issue an order for discovery of evidence in compliance with the actual circumstances.

6. Evidential permissibility of the documents concerning the examination under requisition of witnesses in the Lockheed case.

Decision by the 12th Criminal Division, Tokyo District Court,

Oct. 30, 1979. (Case No. (*toku wa*) 1835 of 1976 etc. Decision on the demand of the procurator to investigate evidence in connection with the case involving violation of the Testimony in the Diet Act. 947 *Hanrei Jihō* 3.)

[Reference: Constitution § § 14, 31, 37 (2), 38 (1) and (2); Code of Criminal Procedure § § 240, 226, 328(2), 321(1) and 324]

[Opinions of the Court]

When a witness is provided with immunity in exchange for information, the value of the statement of the witness becomes subject to question.

1) Of the declaration of non-prosecution made for Mr. Kotchian and others, "the non-prosecution declaration made on the basis of the Code of Criminal Procedure, Article 248, by the Chief of the Tokyo District Public Procurator's Office in charge of the current case is the only one considered to have a legal basis and a direct influence." Other declarations of non-prosecution made by the Procurator-General and the Supreme Court are only supplemental.

2) "In case the witness refuses to testify during the examination under requisition held in the United States for fear of incriminating himself," the documents of the examination cannot be permitted to be evidence running counter to the spirit of the Constitution and the Code of Criminal Procedure, unless it was made under circumstances where the danger of self-incrimination was legally removed or at least under guarantee that such likelihood was realistically removed.

3) In the light of the series of declarations of non-prosecution in the current case, "it is understood that the general situation was such that it was "practically impossible in the light of international justice for the procurators of this country to take disciplinary steps in criminal affairs, such as institution of public prosecution concerning the testimony of the witness in defiance of the series of declarations."

4) "Its stabilized position in practice does not differ much from the position in which punishment shall not be incurred out of

legal reasons." Hence it is reasonable to interpret that the series of declarations of non-prosection are "good enough to quash the rights of witnesses to refuse to make a statement for fear of incriminating themselves."

As such, the document of the examination under requisitions cannot be considered as having been obtained as a result of an infringement of the right to avoid self-incrimination.

[Comment]

The main point at issue in the Lockheed case is the evidential permissibility of the document of the examination under requisition in the U.S. court. In other cases, decisions to the affirmative have been made. (Decision by the Tokyo District Court, Sept. 21, 1978. 904 *Hanrei Jihō* 14: Decision by the Tokyo District Court, Dec. 20, 1978. 912 *Hanrei Jiho* 24.)

The outstanding feature of the current decision lies in the fact that the court, in order to provide reasons to quash the right of witnesses to refuse to make statements for fear of self-incrimination, pointed out the situation has become such that prosecution against witnesses is impossible "in the light of international good faith."

The argument may rise in the future, however, on the legality of the step that the declaration not to institute public prosecution is tantamount to criminal immunity and whether or not such a legal construction is possible.

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6. Commercial Law

Four cases are listed here as representative of the trend of